84-584

No. 83-1871

Office-Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1984

Land & Lake Tours, Inc. ..... *Plaintiff - Appellant*

V.

Elizabeth Dole, Secretary of Transportation, United States Coast Guard ..... *Defendants - Appellees*

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Q. BYRUM HURST, JR.
HURST LAW OFFICES
P.O. Box 1197
Hot Springs, AR 71901
(501) 623-2565

Attorney for Appellant

36 pp

QUESTION PRESENTED FOR REVIEW

I.

Whether passenger carrying vessels on Lake Hamilton, Arkansas, are subject to Coast Guard Safety Inspections pursuant to 46 USC 390 *et seq.*

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES ii

JURISDICTIONAL GROUNDS 1

CONSTITUTIONAL PROVISIONS, STATUTES 2

STATEMENT OF THE CASE 8

ARGUMENT 13

APPENDIX A-1

TABLE OF AUTHORITIES

Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) 11

Livingston v. United States, 627 F.2d 165 (Eighth Circuit 1980), Cert. denied, 450 U.S. 914 (1981) 10

CONSTITUTIONAL PROVISIONS

Article 1, Section 8, Clause 3, United States Constitution 1

Article 3, Section 2, Clause 1, United States Constitution 2

STATUTE REFERENCES

28 U.S.C. 2201 ..... 2, 9

28 U.S.C. 1333 ..... 2, 9

48 U.S.C. 390 *et seq.* 3

No. 83-1871

In the
Supreme Court of the United States

October Term, 1984

Land & Lake Tours, Inc. ..... *Plaintiff - Appellant*

V.

Elizabeth Dole, Secretary of
Transportation, United States
Coast Guard ..... *Defendants - Appellees*

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL GROUNDS

On July 12, 1984, the Opinion delivered by the United States Court of Appeals for the Eighth Circuit was filed. Jurisdiction of this Court is based upon US. Supreme Court Rule 17.1.c., 28 USCA.

CONSTITUTIONAL PROVISIONS & STATUTES

Article 1, Section 8, Clause 3, United States Constitution:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for

the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States; to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Article 3, Section 2, Clause 1:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

28 USC 1333:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 USC § 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11,

any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

46 § 390 et seq.

When used in sections 390-390g, 404, and 526f of this title, unless the context requires otherwise—

(a) The term "passenger" means every person carried on board a passenger-carrying vessel other than—

(1) the owner or his representative;

(2) the master and the bona fide members of the crew engaged in the business of the vessel who have contributed no consideration for their carriage and who are paid for their services;

(3) any employee of the ownner of the vessel engaged in the business of the owner, except when the vessel is operating under a bareboat charter;

(4) any employee of the bareboat charterer of the vessel engaged in the business of the bareboat charterer;

(5) any guest on board a vessel which is being used exclusively for pleasure purposes who has not contributed any consideration, directly or indirectly, for his carriage; or

(6) any person on board a vessel documented and used for tugboat or towboat service of fifty gross tons or more who has not contributed any consideration, directly or indirectly, for his carriage.

(b) The term "passenger-carrying vessel" means any vessel which carries more than six passengers, and which is (1) propelled in whole or in part by steam or by any form of mechanical or electrical power and is of fifteen gross tons or less; (2) propelled in whole or in part by steam or by any form of mechanical or electrical power and is of more than fifteen and less than one hundred gross tons and not more than sixty-five feet in length measured from end to end over the deck excluding sheer; (3) propelled by sail and is of seven hundred gross tons or less; or (4) non-self-propelled and is of one hundred gross tons or less; except any public vessel of the United States or of any foreign state, or any lifeboat forming part of a vessle's lifesaving equipment. The term includes (1) any domestic vessel operating on the navigable waters of the United States, or on the high seas outside of those waters and within the normal operating range of the vessel, and (2) any foreign vessel departing from a port of the United States.

(c) The term "International Convention for Safety of Life at Sea" means the "International Convention for Safety of Life at Sea, 1948" or any similar international convention which comes into force and effect after ratification by the United States Senate.

(d) The term "Secretary" means the Secretary of the department in which the Coast Guard is operating.

§ 390a.

(a) The Secretary shall, at least once every three hours, cause to be inspected each passenger-carrying vessel, and shall satisfy himself that every vessel (1) is of a structure suitable for the service in which it is to be employed; (2) is equipped with the proper appliance for lifesaving and fire protection in accordance with applicable laws, or rules and regulations prescribed by him; (3) has suitable accommodations for passengers and the crew; and (4) is in a condition to warrant the belief that it may be used,

operated, and navigated with safety to life in the proposed service and that all applicable requirements of marine safety statutes and regulations thereunder are faithfully complied with.

(b) The Secretary may prescribe reasonable fees or charges for (1) any inspection made and (2) any certificate, license, or permit issued pursuant to sections 390-390g, 404 and 525f of this title or the rules and regulations established hereunder.

§ 390b.

In order to secure effective provision against hazard to life created by passenger-carrying vessels and to carry out in the most effective manner the provisions of sections 390-390g, 404, and 526f of this title, the Secretary shall prescribe such rules and regulations as may be necessary with respect to design, construction, alteration, or repair of such vessels, including the superstructures, hulls, accommodations for passengers and crew, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers; with respect to all materials used in construction, alteration, or repair of such vessels including the fire prevention and fire retardant characteristics of such materials; with respect to equipment and appliances for lifesaving and fire protection; with respect to the operation of such vessels, including the waters in which they may be navigated and the number of passengers which they may carry; with respect to the requirements of the manning of such vessels and the duties and qualifications of the operators and crews thereof; and with respect to the inspection of any or all the foregoing.

§ 390c.

(a) No passenger-carrying vessel shall be operated or navigated until a certificate of inspection in such form as may be prescribed by the regulations promulgated by the

Secretary under the authority of sections 390-390g, 404, and 526f of this title, has been issued to the vessel indicating that the vessel is in compliance with theprovisions of said sections, and the rules and regulations established hereunder; except that when a foreign passenger-carrying vessel belongs to a nation which is signatory to the International Convention for Safety of Life at Sea, a valid safety certificate issued to the vessel pursuant to the Conventions may be accepted in lieu of the requirement certificate of inspection.

(b) Any passenger-carrying vessel to which a valid certificate of inspection has been issued pursuant to this section shall during the tenure of the certificate be in full compliance with the terms of the certificate.

(c) A certificate of inspection issued pursuant to this section may at any time be voluntarily surrendered and shall be withdrawn and suspended or revoked for noncompliance with any applicable requirements of sections 390-390g, 404, and 526f of this title or regulations thereunder.

§390d.

Any owner, master, or person in charge of any vessel subject to sections 390-390g, 404, and 525f of this title who violates the provisions of said sections, or the rules and regulations established hereunder, shall be liable to the United States in a penalty of not more than $1,000 for each such violation, for which sum the passenger-carrying vessel shall be liable and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the violation.

§ 390e.

Nothing contained in sections 390-390g, 404, and 525f of this title shall be deemed to amend, alter, or otherwise af-

fect the requirements of any International Convention for Safety of Life at Sea.

§ 390f.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 390-390g, 404, and 526f of this title.

§ 390g.

If any provisions of sections 390-390g, 404, and 526f of this title, or the application of any provision of said sections to any person or circumstance is held invalid, the application of such provision to other persons or circumstances, and the remainder of said sections, shall not be affected thereby.

STATEMENT OF THE CASE

Apellant, Land & Lake Tours, Inc., brought this action for declaratory and injunctive relief from regulatory jurisdiction exercised by Appellee, Secretary of Transportation, through Appellee, United States Coast Guard. The Coast Guard had determined that Appellant's passenger-carrying vessels were subject to inspection under 46 USC 390 *et seq.* The district court held that Appellant's vessels were not subject to that statute, and granted declaratory and injunctive relief. Defendants and Appellees herein appealed.

Plaintiff-Appellant, Land & Lake Tours, Inc., has since 1962 operated a business conducting sightseeing tours in Garland County, Arkansas. In so doing, it uses 10 amphibious vehicles known as "ducks." These vehicles operate both on land, wherein passengers are shown a number of attractions and sights in and around Hot Springs, Arkansas, and over the waters of Lake Hamilton, Arkansas. Plaintiff's vessels were built in 1944 and carry up to 22 paying customers and one crew member each.

Plaintiff operated from 1962 to 1976 under state regulation, without any attempted regulation by the Coast Guard. In 1976, a representative of the Coast Guard informed the Plaintiff that the agency was assuming jurisdiction over the inspection of Plaintiff's vessels, that they would be subject to Coast Guard regulations, including triennial safety inspections, and that they would be required to meet its specifications during water-borne operations. The Plaintiff attempted to comply with the Coast Guard's regulations, purportedly at substantial expense. However, Plaintiff was thereafter cited for violation of those regulations, and was required to make certain modifications to the vessels in order to be allowed to continue operation on the waters of Lake Hamilton.

In 1982, Plaintiff determined that meeting the Coast Guard's safety requirements would cost so much that it

would not be able to continue to operate. At that point, Plaintiff began to inquire as to the basis of the Coast Guard's jurisdiction over its operation, and this lawsuit followed.

Jurisdiction to hear the action was set in the United States District Court for the Western District of Arkansas under the provisions of 28 USC Section 2201 and Rule 57 of the Federal Rules of Civil Procedure. The Plaintiff alleged a justifiable controversy between a corporate entity of the State of Arkansas against the Department of Transportation, United States Coast Guard, of the United States of America, involving a federal statute, more specifically 28 USC Section 1333. The Plaintiff is a corporation organized pursuant to the laws of the State of Arkansas and authorized to do business within the State of Arkansas and specifically Hot Springs, Garland County, Arkansas. The Defendant, Elizabeth Dole, is Secretary of the Department of Transportation. The United States Coast Guard is an agency of the Department of Transportation, subject to the control of the Secretary.

The district court first addressed the question whether Lake Hamilton, formed from part of the Ouachita River, is a navigable body of water subject to the jurisdiction of the Coast Guard. The court recited the following facts regarding Lake Hamilton:

> Lake Hamilton was formed when the Carpenter Dam was built across the Ouachita River near Hot Springs, Arkansas. The River has its source in the Ouachita Mountains in western Arkansas, from whence it flows through Arkansas in a southerly direction to Louisiana to its confluence with the Black and Red Rivers, and thence into the Mississippi River. There are two other dams on the upper segment of the River, not far from its source, with a lake above each dam. Lake Hamilton is in the middle, with Lake Ouachita, formed by Blakely Dam, to the north and Lake Catherine, formed by Remmell Dam, to the south. No locks or other conveyances

> are available for transporting watercraft around or through any of these dams. In its natural state, the river has provided various forms of transport by modes of navigation from its confluence with the Mississippi River to Camden, Arkansas, a distance of about 360 miles. From Camden, the River extends northward to its source, a distance of about 150 miles; the three dams and lakes are located on this stretch of the river. The district court stated: "In its natural state this segment of the Ouachita River from Camden north—northwest has never been utilized for navigation purposes. There is no history of transportation of any sort by navigation which occurred on this upper segment of the river."

Regarding present navigability of the river's upper stretch, the district found that there was none and had been none for at least 30 years; "The dams completely blocked any travel between the river and the lake. It is impossible to travel by boat without portaging a considerable distance from Blakely Dam to below Remmell Dam to the south. Over the years, no traffic has occurred on these man-made lakes except small skiffs and other instruments of transportation for recreational purposes by exclusively local operation."

The district court relied upon this court's decision in *Livingston v. United States*, 627 F.2d 165, 170 (Eighth Circuit 1980), *Cert. denied*, 450 U.S. 914, for the proposition that "Federal Admiralty jurisdiction turns on contemporary navigability in fact." Because the court had found "there is no history that the upper part of the Ouachita River in the area of these lakes and dams was ever used for commercial shipping or navigation of any kind," and because "there can be no dispute over the fact that there has been no commercial activity" since construction of the dams, the court concluded that there was no admiralty jurisdiction over Lake Hamilton. It therefore, held, "in that the Defendant Coast Guard cannot satisfy the test, jurisdiction cannot extend its authority to regulate the limited operation of the vehicles used by the Plaintiff in its

sightseeing operations controlled by state and local entities. Accordingly, the court granted summary judgment for Plaintiff, denied summary judgment for Defendants, and permanently enjoined the Coast Guard from requiring inspection of Plaintiff's vessels.

On review, the United States Court of Appeals for the Eighth Circuit reversed the district court, holding that the case did not involve the district court's Article 3 admiralty jurisdiction, but instead Congress' Article 1 power to regulate interstate commerce. The Court of Appeals stated that, "The federal Government has an intense interest in the safety of passenger vessels, and the safety of passenger vessels has a substantial effect on interstate commerce. Undoubtedly, Congress may require the inspection of pasenger vessels, impose safety requirements, and exercise its authority for such other reasons as may seem to be in the interest of furthering navigational commerce." Furthermore, the court cited *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979), for the proposition that Congressional authority over the waters of this nation does not depend on a stream's navigability. The court, further quoting from *Kaiser Aetna*, indicated that a wide spectrum of economic activities affects interstate commerce and thus are susceptible of Congressional regulation under the commerce clause irrespective of whether navigation, or, indeed, water, is involved. Although the court indicated that navigability was not actually required to support Federal intervention, since the commerce clause may be used to support Federal intervention in any case, the court went on to find as a fact that the Ouachita River in its natural and ordinary state was capable of being used as a highway for commerce, and therefore was navigable. The court went on, and found that the Ouachita River, in the area which is now Lake Hamilton, was at one time navigable, and that due to this fact, the vessels operating on Lake Hamilton are subject to vessel safety inspection and certification by the Coast Guard, pursuant to the commerce clause. Therefore, the Court of Appeals held that the ducks operated on Lake

Hamilton by Land & Lake Tours are vessels operating on the navigable waters of the United States and as such are subject to the Coast Guard's vessel safety specifications and periodic safety inspections.

ARGUMENT

Squarely, the question is whether or not Appellant's vessels are engaged in interstate commerce. If they are not, then they should be exempt from any and all Federal regulation and inspection. If Appellant's vessels are engaged in interstate commerce, then they are subject to Federal regulation and inspection.

Appellant's operation is a wholly intrastate one, as none of Appellant's vessels ever leave the confines of the State of Arkansas. Although some of the passengers on Appellant's vessels are from without the State of Arkansas, Appellant's vessels are at all times maintained and kept within the boundaries of the State. Therefore, it can only be argued by Appellees that Appellant's operation somehow affects or is involved in interstate commerce. It is argued here, that the commerce clause of the Constitution, through which Appellee seeks to restrict Appellant's operation, affects interests and operations which are wholly local in nature. The commerce clause has been used by numerous governmental agencies and organizations, and the Congress itself, to extend Federal powers into areas previously left for state regulation. It has only been recently, within the past 40 years, that this Court has extended the Federal power through the commerce clause.

It is here argued that now is the time for a more restrictive interpretation of the commerce clause. Interstate commerce is just that, commerce between the states, and activities and operations that are wholly intrastate in character, origin and termination should not be construed to impinge upon or affect interstate commerce, unless a direct connection can be shown. Here, Appellant operates vessels which are and have been within the State of Arkansas for at least 10 years, and which never leave the boundaries of the State of Arkansas. Certainly only a strained interpretation of the terms "interstate commerce" could suggest the conclusion that Appellant is operating its business within in-

terstate commerce. It is time now for this court to put an end to this folly of considering every action, even though intrastate in character, to be one affecting interstate commerce. It is impossible to belabor the point that interstate commerce is exactly that: commerce or commercial activity *flowing* between the several states, not commercial activity conducted entirely within bounds of a particular state. The term, "state sovereignity" is almost a lost one. Under the present definition of "interstate commerce" there is no such thing as "state sovereignity." Only if this Court grants this Petition, hears this case, and decides that Appellant's operation should only be subject to state regulation, will there be "state sovereignity." It is now time to grant again, to the several states, the power and authority to regulate conduct which is wholly intrastate in character, such as Apellant's boat operation, and the states should be allowed to protect their own citizens in the way in which they deem best. Here, Appellant's operation has been subject to state regulation since the inception of Appellant's business. Appellant has conducted its operation without incident or accident, while subject to state regulation. Therefore, the facts themselves show that state regulation is entirely adequate and proper in case such as this one, where holly intrastate operations are involved. The state has regulated Appellant's business, with excellent results, and now Appellees are attempting to further regulate Appellant's operation, although history indicates that Appellant's operation has been extremely well regulated, as Appellant has operated its business without incident, and also Appellant is still operating a business. If the Appellees prevail before this Court, Appellant will be forced to close its business, and therefore the regulations which Appellee seek to implement over Appellant will have been ruinous to one business in Arkansas. However, if this Court rules that the Federal power conferred by the Commerce Clause does not extend to Appellant's business operation, then Appellant will continue to operate its business, fettered only by state regulation and controls and furthermore Appellant's operation will remain in place. It would seem that effective and proper regulation will be

regulation which only seeks to make an operation safe, not regulation which serves to totally remove that operation in question.

Therefore, in conclusion, it is urged that Appellant's vessels are not involved in interstate commerce, and therefore, the regulations of the United States Coast Guard should not affect or apply to Appellant's wholly intrastate operation. Thus, the decision of the United States Court of Appeals for the Eighth Circuit in this matter should be reversed.

Respectfully submitted,

Q. BYRUM HURST, JR.
HURST LAW OFFICES
P.O. Box 1197
Hot Springs, AR 71901
(501) 623-2565

DAVID B. SWITZER
201 Woodbine
Hot Springs, AR 71901
(501) 634-8474

Attorney for Appellant

APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

LAND & LAKE TOURS, INC.,	]	
	]	
Plaintiff,	]	
	]	
v.	]	No. 82-6014
	]	
DREW LEWIS, Secretary of the Department of Transportation, and the UNITED STATES COAST GUARD,	]	
	]	
Defendants.	]	

MEMORANDUM OPINION

In this action by the plaintiff, Land and Lake Tours, Inc. (Land and Lake), has filed a complaint seeking declaratory judgment and injunctive relief from regulatory jurisdiction as proposed by the defendant, Drew Lewis, Secretary of the Department of Transportation (Secretary), through the United States Coast Guard (USCG). Jurisdiction is sought under the provisions of 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure. Plaintiff alleges a justifiable controversy between a corporate entity of the state of Arkansas against the Department of Transportation, United States Coast Guard, of the United States of America, involving a federal statute, more specifically 28 U.S.C. § 1333.[1]

---

[1]28 U.S.C. § 1333, Admiralty, Maritime Jurisdiction; "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The plaintiff is a corporation organized pursuant to the laws of the state of Arkansas and authorized to do business within the state of Arkansas and specifically Hot Springs, Garland County, Arkansas.

The defendant, Drew Lewis, is Secretary of the Department of Transportation. The United States Coast Guard is an agency of the Department of Transportation, subject to the control of the Secretary. The defendant has answered as of and in behalf of the United States of America. 49 U.S.C. § 1655(b)(1).

The plaintiff, Land and Lake, is now and has been the owner and operator since 1962 of a business engaged in conducting sightseeing tours in Garland County, Arkansas. The plaintiff, in operating its sightseeing business, utilizes *10 amphibious* vehicles known as "DUCK'S" or "ducks." The operation engaged in by the plaintiff is a tourist attraction in and around Hot Springs, Arkansas, and within Garland County. For this service a fare is charged and passengers are given a joint service of sightseeing and recreation. These vehicles operate on land wherein passengers are shown a number of attractions and sights in and around Hot Springs. Additionally, the vehicles travel over the waters of Lake Hamilton after which they return to the point of origin.

The plaintiff operated such business of sightseeing and recreation from 1962 until 1976, under the laws and regulations of the state of Arkansas, and without any attempted regulation or interference by the United States Coast Guard, an agency of the United States Government. It met all of the requirements for *safety by the city of Hot Springs* and the *state of Arkansas*. During the 14 years, inspection of plaintiff's operation was approved for safety, health and welfare of passengers, and all required inspections for vehicle maintenance by appropriate agencies of the state of Arkansas.

In 1976 a representative of the United States Coast Guard informed the plaintiff that the agency was assuming jurisdiction over the operation of plaintiff's amphibious vehicles and that it would be subject to the regulations of the Coast Guard and required to meet its specifications during its amphibious operations. It appears that the Coast Guard, in carrying out rules and regulations, would require refabricating, restructuring and reassembling of various parts, devices and other equipment on the sightseeing amphibious vehicles referred to as "ducks."

Although the plaintiff was unaware of the jurisdictional basis for the United States Coast Guard's sudden involvement in its operation, the plaintiff attempted to comply with the agency's rules, regulations and specifications at substantial expense.

In the operation of its business, which had been successful and without incident for 20 years, the Coast Guard commenced citing the plaintiff for failure to comply with its regulations, and required the plaintiff to make certain modifications to the vehicles in order to continue operation on that part of the tour in the waters of Lake Hamilton. It became apparent to the plaintiff in 1982 that the requirements of the Coast Guard were such that it could not continue to operate. At this stage the plaintiff began to make inquiries as to the jurisdiction of the Coast Guard over its operations.

The plaintiff, after seeking legal advice and assistance, determined that the Coast Guard' assuming jurisdiction over its operation was misplaced, and by this action seeks a declaration from the Court as to such jurisdiction and to enjoin the Coast Guard from any further inspection, regulation or any jurisdiction over the operation of its business or of the vehicles engaged in the business of sightseeing and recreation.

The defendants have responded to plaintiff's request for a declaration against the defendant Coast Guard. The

defendants, by the United States Attorney, admit that in 1976 the USCS notified the plaintiff that its vehicles were subject to inspection and that in 1981 the Coast Guard inspected the plaintiff's "ducks" listing a number of discrepancies.

The plaintiff, Land and Lake, has filed a motion for summary judgment contending that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law on its complaint for declaratory judgment and injunctive relief. Counsel for the plaintiff has filed a brief in support of its motion.

In response to plaintiff's motion for summary judgment, the defendants, Secretary and Coast Guard, have filed a counter-motion for summary judgment. The defendants have submitted a brief by counsel contending that there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law.

The issues having been joined in the case and the question for the court fully developed, the case is ready for decision.

The facts in the case are not in dispute and the Court has jurisdiction over the issues of law and the parties. 28 U.S.C. § 2201; Rule 57 of the Federal Rules of Civil Procedure; and 28 U.S.C. § 1333.

Rule 57(c) of the Federal Rules of Civil Procedure provides that a summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

There are two issues of law for the Court to decide. The primary issue for the Court's determination is whether Lake Hamilton, formed as a part of the Ouachita River, is a

navigable body *of water subject to* the jurisdiction of the Coast Guard.

The second issue in the case is whether the plaintiff's passenger-carrying vehicles, which operate as a part of the plaintiff's sightseeing tours and which operate for a brief period of time on each tour on the waters of Lake Hamilton, *are subject to inspection and control by the USCG.*

It is undisputed that Lake Hamilton was formed by Carpenter Dam built across the Ouachita River near Hot Springs, Arkansas. The source of the Ouachita River is in the Ouachita Mountains in Western Arkansas, and it flows through Arkansas in a southerly direction and into Louisiana to the confluence with the Black and Red Rivers in Concordia Parish, Louisiana, thus into the Mississippi River. There are three dams on the upper segment of the Ouachita River not far from its source. In addition to Carpenter Dam, Blakely Dam forms Lake Ouachita, a short distance north of Lake Hamilton. Remmel Dam forms Lake Catherine to the south of Lake Hamilton. No locks or other conveyances are available for transporting watercraft around or through any of these dams.

In its natural state the Ouachita River has provided various forms of transport by modes of navigation from its confluence with the Mississippi River in Louisiana to Camden, Arkansas, a distance of approximately 360 miles.[2]

---

[2]Around the turn of the century the lower Ouachita River was improved for navigation by the United States government, Corp of Engineers, by construction of seven small locks and dams between the mouth of the Ouachita River and Camden, Arkansas. The improvement of the River provided 6½ foot depth for this part of the River for navigation purposes. These small locks and dams are presently being displaced and to provide nine feet of water for navigation. The last new construction is now underway near Calion, Arkansas. It is traditional that there was some navigation at times on this part of the Ouachita River prior to the twentieth century.

From Camden, Arkansas the Ouachita River extends north-northwest to its source a distance of approximately 150 miles. It consists of a small stream through the mountainous area of that part of Arkansas.[3]

In its natural state this segment of the Ouachita River from Camden north-northwest has never been utilized for navigation purposes. There is *no history of transportation* of any sort by navigation which occurred on this upper segment of the River.

Carpenter and Remmel Dams where constructed by private industry in the late teens or early twenties for electric power sources for distribution to customers. Blakely Dam was constructed in the late 1950s by the Corp of Engineers. No provisions were made in the construction of the three dams for passage of any kind of craft. The dams completely blocked any travel between the River and the lakes. All three dams are utilized in generating electricity. It is impossible to travel by boat without portaging a considerable distance from Blakely Dam to below Remmell Dam to the south. Over the years no traffic has occurred on these man-made lakes except small skiffs and other instruments of transportation for recreational purposes by exclusiveiy local operations.

It is the contention of the defendants Secretary and Coast Guard that the definition of navigable water for determining the existence of Admiralty and Maritime jurisdiction of the district courts does not apply to determinations of whether a body of water is navigable for commerce clause provisions. In support of their contention the defendants rely on *Kaiser Aetna v. United States*, (444 U.S.

---

[3]In addition to the locks and dams mentioned herein, there is presently a dam on the Caddo River (De Gray Dam), a tributary of the Ouachita River. To the southwest is the Murphreesboro Dam on the Little Missouri River, which is also a tributary of the Ouachita River.

164) 100 S.Ct. 383, 388 (1979); and *Admas v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975).

In a recent decision our own Eighth Circuit Court of Appeals considered this question on a substantially similar issue on the Norfolk River, where a dam formed Lake Norfolk in Northwestern Arkansas. In *Livingston v. United States*, 627 F.2d 165 (1980), the Court stated the rule applicable to the issue as follows:

> In *Kaiser Aetna*, the Court noted specifically that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical. See id. 100 S.Ct. at 389-90. What is required in those contexts is *a functional analysis of "navigability"* so that the limits of governmental authority are determined in accordance with the purposes it serves. In the case at hand, such an analysis indicates that federal admiralty jurisdiction should not be extended to Mr. Livingston's accident in the Norfolk River.

Also the defendants reliance on *Adams, supra*, is misplaced. In *Livingston, supra*, page 170, the Eighth Circuit held:

> Both the Ninth and the Seventh Circuits addressing the precise question before us, have reached the same conclusion. In *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), the court held that a dam-obstructed portion of the Missouri River no longer traversed by commercial maritime shipping was not navigable for purposes of admiralty jurisdiction, even though it would be considered navigable under the commerce clause. The court observed that, absent some present or potential commercial activity there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a

> forum and applying their law to regulate conduct within their borders. *Id.* at 439. In *Chapman v. United States*, 575 F.2d 147 (7th Cir.) (en banc), cert. denied, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978), the court expressly adopted the reasoning in *Adams*, holding that federal admiralty jurisdiction did not encompass a claim brought by the estate of a man who drowned in a river last used for commercial shipping in 1931.

In its brief the government cites numerous cases, including *Livingston v. United States, supra*, and two other Eighth Circuit cases, *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957), and *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1978), on the question of the extent of Admiralty and Maritime jurisdiction of the federal courts.

In *Livingston v. United States, supra*, the Eighth Circuit dealt with these prior decisions and distinguished them by concluding that in neither *George v. Beavark, Inc.*, nor *Loc-Wood Boat & Motors* "was this court squarly faced with the question of whether current navigability *in fact* is required by admiralty jurisdiction. [See note 4] Moreover, there are indications in an earlier decision by this court that current navigability might well be required. In *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906).

Without belaboring the issue unnecessarily this court adopts the reasoning and conclusions of *Livingston v. United States, supra.* At page 169 Judge Bright, Circuit Judge, states for himself, Chief Judge Lay and Judge Henley, Circuit Judges, that:

> Federal admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity. Admiralty law, as a consequence, is concerned almost exclusively with the special needs of the shipping industry. See *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 269-70, 93 S.Ct. 493, 504-05, 34 L.Ed. 454 (1972); G. Gilmore and C. Black, *The Law of Admiralty*

> 1, 11-12 (2d ed. 1975). Extensions of admiralty jurisdiction have followed the opening of new waters to commercial shipping. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453-54, 13 L.Ed. 1058 (1851). In our view, the closing of waters to commercial shipping should likewise have the effect of eliminating admiralty jurisdiction over them. [n. 6] In other words, the concept of 'navigability in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping.

In the instant case the court concludes, as already indicated, *there is no history that the upper part of the Ouachita River in the area of these lakes and dams was ever used for commercial shipping or navigation of any kind.* Hence, even the closing of the water by the construction of dams had no effect on any travel of these waters. If this upper part of the River could be considered in its natural state of being used for purposes of commerce and could be considered "navigable in fact" as a proper river or highway, the closing of the waters by the three dams would then have the effect of eliminating admiralty jurisdiction over them.

There can be no dispute over the fact that there has been no commercial activity on the Ouachita River at Lake Hamilton or any of the other lakes since the construction of the dams, Carpenter and Remmel in the 1920s and Blakely Mountain Dam some years thereafter.

As concluded by the court in *Livingston, supra*, at page 170;

> The history of commercial traffic on the river, whatever its intrinsic interest, does not determine the scope of present-day admiralty jurisdiction. Notwithstanding any expressions to the contrary in prior decisions of this court, *federal admiralty jurisdiction turns on contemporary navigability in fact.*

This conclusion is required in the context of this case where the actual capability of the upper part of the river to support navigation is critical and by functional analysis of "navigability" limits authority in accordance with the purposes it serves.

In that the defendant Coast Guard cannot satisfy the test, its jurisdiction cannot extend its authority to regulate the limited operation of the vehicles utilized by the plaintiff in its sightseeing operations controlled by state and local entities.

The motion of the plaintiff for summary judgment will be granted and the motion of the defendant for summary judgment will be denied. The request on behalf of the plaintiff for injunctive relief will be granted and the defendants will be enjoined from any further control by regulation, inspection, or other means.

DATED this 31st day of March, 1983.

/s/ Oren Harris
UNITED STATES DISTRICT JUDGE

Filed March 31, 1983
U.S. District Court
Western Dist. Arkansas

Pat L. Graham, Jr., Clerk.
By: /s/ Jane C. Wright
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-1871

Land and Lakes Tours, Inc.,	*	
	*	
Appellee,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Western District
Drew Lewis, Secretary of	*	of Arkansas
Department of Transportation;	*	
United States Coast Guard,	*	
	*	
Appellants.	*	

Submitted: January 13, 1984
Filed: July 12, 1984

Before BRIGHT, McMILLIAN and ARNOLD, Circuit Judges.

McMILLIAN, Circuit Judge.

Drew Lewis,[1], Secretary of the Department of Transportation, and the United States Coast Guard appeal from a final order of the District Court for the Western District of Arkansas granting summary judgment in favor of Land & Lake Tours, Inc. (hereafter L & L). For reversal appellants argue that the district court erred in determining that the Coast Guard lacked jurisdiction to conduct safety inspections of L & L's amphibious vehicles operating on Lake Hamilton, Arkansas. For the reasons discussed below, we reverse.

[1]Elizabeth Dole became Secretary of the Department of Transportation after this litigation began.

Since 1962 L & L has operated a business conducting sightseeing tours in Garland County, Arkansas. L & L transports tourists in ten World War II vintage amphibious vehicles called DUKWs, but commonly referred to as "ducks." These vehicles carry up to twenty-two passengers, who are shown a number of attractions in and around Hot springs, Arkansas, and over the waters of Lake Hamilton. Between 1962 and 1976, the state regulated L & L's business.

In 1976 a representative of the Coast Guard informed L & L that the agency was assuming jurisdiction over the inspection of the "ducks" pursuant to 46 U.S.C. §§ 390(b), 390a (repealed 1983).[2] These statutes required the Coast Guard to conduct triennial safety inspections of the vehicles and set minimum federal specifications for passenger-carrying vessels. Although L & L attempted to comply, allegedly at great expense, the Coast Guard continued to cite L & L for safety violations and required certain modifications of the "ducks" before they could be operated on Lake Hamilton.

In 1982 L & L decided to challenge the Coast Guard's jurisdiction to regulate its business. L & L contended that it had operated for twenty years without incident under state regulation and was not financially able to comply with the

---

[2]46 U.S.C. § 390a provided for the triennial inspection of passenger-carrying vessels and set forth the criteria for those inspections. Section 390(b) defined "passenger-carrying vessel" and stated that the term included "any domestic vessel operating on the navigable waters of the United States." These provisions were repealed by the Act of Aug. 26, 1983, Pub. L. 98-89, § 4(b), 97 Stat. 599, 604, 605. Section 4(b) of the Act provides that the repeal is effective "except for . . . proceedings that were begun, before the date of enactment of this Act and except as provided by section 2 of this Act." 46 U.S.C.A. app. § 4(b) (West Supp. 1983). Section 2(d) of the Act states that "[a]n action taken or an offense committed under a law replaced by this Act is deemed to have been taken or committed under the corresponding provision of this Act." *Id.* § 2(d). 46 U.S.C. § 390a corresponds to 46 U.S.C.A. §§ 3301(8) (small passenger vessel), 3305 (West Supp. 1983). 46 U.S.C. § 390(b), defining a passenger-carrying vessel, corresponds to 46 U.S.C.A. § 2101(21)(B) (passenger on a small passenger vessel), (35) (small passenger vessel) (West Supp. 1983).

Coast Guard's regulations. On cross-motions for summary judgment, the district court ruled in favor of L & L and enjoined appellants from any further regulation or inspection of the "ducks." The district court based its jurisdiction on 28 U.S.C. § 1333 (admiralty and maritime jurisdiction). Relying on *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), the district court held that the Coast Guard lacked admiralty jurisdiction to regulate any vehicles operating on Lake Hamilton because Lake Hamilton was not "presently navigable in fact." *Land & Lake Tours, Inc. v. Lewis*, No. 82-6014 (W.D. Ark. Apr. 4, 1983). This appeal followed.

Appellants concede on appeal that no federal admiralty jurisdiction exists with respect to Lake Hamilton. Appellants argue, however, that Lake Hamilton is a navigable water of the United States for commerce clause purposes, and Congress' authority to require inspection of L & L's vehicles is premised on the commerce clause, U.S. Const. art. I, § 8, cl. 3, and does not involve the admiralty jurisdiction clause, U.S. Const. art. III, § 2, cl. 1.[3]

In *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (emphasis added), the Supreme Court stated:

> [*United States v.*] *Appalachian Power Co.*, [311 U.S. 377 (1940),] indicates that *congressional authority over the waters of this Nation does not depend on a stream's "navigability."* And, as demonstrated by this Court's decisions in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942), a wide spectrum of economic activities "affect"

---

[3]Because present navigability in fact is the linchpin of admiralty jurisdiction, the district court's finding that Lake Hamilton was currently non-navigable arguably ousted the court of jurisdiction under 28 U.S.C. § 1333. We find, however, that the issues before the district court raised federal questions involving Congress' power under the commerce clause, and jurisdiction therefore obtained under 28 U.S.C. § 1331.

> interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause *irrespective of whether navigation, or, indeed, water, is involved.* The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as "navigable water of the United States."

The Court cautioned that because the concept of navigability has been used for several purposes (for example, to define the scope of Congress' regulatory authority under the commerce clause and to delimit the admiralty and maritime jurisdiction of federal courts under art. III, § 2 of the Constitution), "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Id.* at 171 (quoting with approval from the district court opinion, 408 F. Supp. 42, 49 (D. Hawaii 1976) (emphasis in original)).

In the present case, the district court's reliance on *Livingston* was misplaced. *Livingston* involved a wrongful death action against the government based on the district court's admiralty jurisdiction as set forth in 28 U.S.C. § 1333. We held there that "the district court lacked admiralty jurisdiction because the accident occurred on waters that, though once used for commercial shipping, are no longer navigable in fact." 627 F.2d at 165. The case at bar did not involve the district court's article III admiralty jurisdiction, but instead Congress' article I power to regulate interstate commerce. As noted in *Kaiser Aetna v. United States*, 444 U.S. at 173-74, Congress' article I power to regulate interstate commerce does not depend upon "navigability." Here, the federal government has an intense interest in the safety of passenger vessels, and the safety of passenger vessels has a substantial effect on interstate com-

merce.[4] Undoubtedly Congress may require the inspection of passenger vessels, impose safety requirements, and "exercise its authority for such other reason as may seem to it in the interest of furthering navigation or commerce." *Id.* at 174.

Thus, the vessel safety specifications and periodic safety inspection requirements represent an exercise of Congressional power under the commerce clause, which has been delegated to the Coast Guard. Although characterization of Lake Hamilton as "navigable waters of the United

---

[4] The original laws [governing the inspection and certification of vessels] were directly related to the safety of the relatively new and potentially dangerous steam vessel. The demand for Federal remedial legislation began during the early 1800's after frequent and disastrous explosions of steam boilers on passenger vessels. This directly led to the first maritime safety laws in 1838 that required periodic inspection and certification of vessels engaged in the transportation of passengers and freight on the waters of the United States. This was followed by a more extensive steamboat inspection law in 1852.

. . .

In 1864 the principal inspection and licensing provisions of the 1852 Act were made applicable to ferries, towing vessels, and canal boats. However, steamboat explosions continued with high loss of life and property. One of the greatest of all disasters, the destruction of the passenger vessel *Sultana* by explosion and fire with a loss of life estimated at more than 1,500 lives in April 1865, led to renewed legislation efforts. In 1871 this culminated with legislation that combined a number of new requirements into a coherent and unified body of maritime safety laws . . . .

In the more than 100 years since then, as the public recognized the need for vessel safety legislation, primarily as the result of maritime disasters, other classes of vessels [than steam vessels] were subjected to Federal inspection or regulatory control. These included . . . all vessels carrying more than six passengers in 1956 . . . .

H.R. Rep. No. 338, 98th Cong., 1st Sess. 136-37, *reprinted in* 1983 U.S. Code Cong. & Ad. News 948-49.

States" is not necessary to support Congressional authority to regulate vessel safety under the commerce clause after *Kaiser Aetna v. United States*, *id.* at 173-74, we note that the term "passenger-carrying vessel" is in part defined in 46 U.S.C. § 390(b) (now repealed)[5] to include "any vessel operating on the navigable waters of the United States." In *Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975) (citations omitted), a case decided before *Kaiser Aetna*, the court discussed the meaning of "navigable waters of the United States" in the context of mmerce clause regulation:

> The commerce clause vests power in Congress to regulate all waters navigable in interstate or foreign commerce. In determining the scope of navigable waters for purposes of exercising the commerce power, the courts developed the doctrine that if a waterway was navigable in its natural and ordinary condition, it remained so despite subsequent obstruction.

Cf. Livingston v. United States, 627 F.2d 165, 169-70 (8th Cir. 1980) (comparison of admiralty jurisdiction, which requires present navigability in fact for commercial shipping, with commerce clause jurisdiction, which requires historical navigability), *cert. denied*, 450 U.S. 914 (1981). Lake Hamilton is part of the navigable waters of the United States because of the part of the Ouachita River which was obstructed by dams to create Lake Hamilton was navigable in its natural and ordinary condition. *See Madole v. Johnson*, 241 F. Supp. 379, 382 (W.D. La. 1965) (specific finding that the Ouachita River in its natural and ordinary state is or was capable of being used as a highway for commerce); *see also Cooper v. United States*, 489 F. Supp. 200, 203 (W.D. Mo.) (similar lake created by dam on river and located within one state; vessels operating on lake subject

---

[5]The definition of "small passenger vessel" in the 1983 Act does not include a reference to the "navigable waters of the United States." 46 U.S.C.A. § 2101(21)(B), (35) (West Supp. 1983).

to vessel safety inspection and certification by Coast Guard), *vacated on other grounds*, 500 F. Supp. 191 (1980). Thus, the ducks operated on Lake Hamilton by L & L are vessels operating on the navigable waters of the United States and as such are subject to the Coast Guard's vessel safety specifications and periodic safety inspections.

Accordingly, the order of the district court is reversed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT